274A

Nos. 06-5618 & 06-5754

IN THE

Supreme Court of the United States

MARIO CLAIBORNE,

Petitioner,

v.

UNITED STATES

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals For The Eighth Circuit

VICTOR A. RITA,

Petitioner,

v.

UNITED STATES

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals For The Fourth Circuit

BRIEF *AMICUS CURIAE* OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONERS

JEFFREY L. FISHER
CO-CHAIR, NACDL
AMICUS COMMITTEE
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081

MIGUEL A. ESTRADA
Counsel of Record
DAVID DEBOLD
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Amicus Curiae

QUESTION PRESENTED

Is it consistent with *United States v. Booker*, 543 U.S. 220 (2005), either to require that a sentence which constitutes a substantial variance from the Guidelines be justified by extraordinary circumstances or to presume that a within-Guidelines sentence is reasonable?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 5

I. A Requirement Of Extraordinary Circumstances For Substantial Variances From The Guidelines Is Inconsistent With This Court's *Booker* Decision. 5

II. The History Of The Guidelines Demonstrates That Courts Should Neither Give Them A Presumption Of Reasonableness Nor Require Extraordinary Circumstances For Substantial Variances. 12

A. The Sentencing Guidelines And The Ranges They Produce For Individual Cases Do Not Incorporate All Of The Sentencing Purposes Or Factors Set Forth In 18 U.S.C. § 3553(a). 12

1. The Sentencing Guidelines were not written to ensure that a within-Guidelines sentence complies with

the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2). 13

2. The Guidelines ranges do not account for important Section 3553(a) factors. 15

B. The History Of The Guideline Amendment Process Has Further Undermined Any Argument For A Presumption Of Reasonableness. 21

1. Changes to individual provisions have not addressed the failure of the Guidelines to account for and balance the multiple statutory purposes of sentencing. 22

2. The Sentencing Guidelines have not been refined to reflect developments in the sentencing "common law." 25

III. Reasonableness Review Must Operate Without Giving The Guidelines Range Special Weight. 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

Cases

Blakely v. Washington,
542 U.S. 296 (2004). 4, 6, 8

Harris v. United States,
536 U.S. 545 (2002) 9

Koon v. United States,
518 U.S. 81 (1996) 7, 29

Mistretta v. United States,
488 U.S. 361 (1989) 21

Rangel-Reyes v. United States,
547 U.S. __ (2006) 9

United States v. Bishop,
2006 WL 3237027 (10th Cir. Nov. 9, 2006) 7

United States v. Bockes,
447 F.3d 1090 (8th Cir. 2006) 27

United States v. Booker,
543 U.S. 220 (2005) ..... *passim*

United States v. Bryant,
310 F.3d 550 (7th Cir. 2002) 27

United States v. Claiborne,
439 F.3d 479 (8th Cir. 2006) 6, 12, 21

United States v. Dalton,
404 F.3d 1029 (8th Cir. 2005) 3, 29

United States v. Delaney,
427 F.3d 1224 (9th Cir. 2005) 27

United States v. Diaz-Villafane,
874 F.2d 43 (1st Cir. 1989) 29

United States v. Emmenegger,
329 F. Supp. 2d 416 (S.D.N.Y. 2004) 17

United States v. Green,
436 F.3d 449 (4th Cir. 2006) 29

United States v. Hampton,
441 F.3d 284 (4th Cir. 2006) 3

United States v. Hascall,
76 F.3d 902 (8th Cir. 1996) 27

United States v. Jaber,
362 F. Supp. 2d 365 (D. Mass. 2005) 22

United States v. Jiménez-Beltre,
440 F.3d 514 (1st Cir. 2006) 13, 30

United States v. Johnson,
445 F.3d 339 (4th Cir. 2006) 3

United States v. Johnson,
427 F.3d 423 (7th Cir. 2005) 7

United States v. Leavitt,
925 F.2d 516 (1st Cir. 1991) 27

United States v. Lindquist,
421 F.3d 751 (8th Cir. 2005) 27

United States v. McCall,
439 F.3d 967 (8th Cir. 2006) 27

United States v. McMannus,
436 F.3d 871 (8th Cir. 2006) 3

United States v. Richardson,
437 F.3d 550 (6th Cir. 2006) 27

United States v. Rogers,
448 F.3d 1033 (8th Cir. 2006) 7

United States v. Sun Bear,
307 F.3d 747 (8th Cir. 2002) 27

United States v. Watts,
519 U.S. 148 (1997) 10

Statutes

18 U.S.C. § 3553(a) ..... *passim*

21 U.S.C. § 841(b) 10

28 U.S.C. § 991 18

28 U.S.C. § 994 ..... *passim*

USSG § 1B1.3 ..... 9, 17

USSG § 2B1.1 10

USSG § 2D1.1 ..... 10, 17

USSG § 2J1.2 ..... 10, 17

USSG § 2J1.3 11

USSG § 2K2.1 17

USSG § 4A1.3 27

USSG § 5H1.4 16

USSG § 5H1.6 16

USSG § 5H1.11 16

USSG § 5K2.12 16

USSG App. C (2006) 22, 27

USSG ch. 1, pt. A (1987) 13, 14, 21, 25

USSG ch. 4 15

Miscellaneous

Amy Baron-Evans, *The Continuing Struggle for Just, Effective, and Constitutional Sentencing After* United States v. Booker*: Why and How the*

Guidelines Do Not Comply with § 3553(A),
30 Champion 32 (2006).....22

Dissenting View of Commissioner Paul H. Robinson on the Promulgation of Sentencing Guidelines by the United States Sentencing Commission,
52 Fed. Reg. 18,121, 18,122 (May 1, 1987) 14

Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics in Modern Sentencing Reforms*,
58 Stan. L. Rev. 277 (2005) 25

Federal Bureau of Prisons, Quick Facts 15

Federal Judicial Center, *The U.S. Sentencing Guidelines: Results of the Federal Judicial Center's 1996 Survey* (1997).....19

Frank O. Bowman, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*,
105 Colum. L. Rev. 1315 (2005) 23

Frank O. Bowman, *The Year of Jubilee . . . Or Maybe Not: Some Preliminary Observations About the Operation of the Federal Sentencing System After Booker*,
43 Hous. L. Rev. 279 (2006).....2, 25

Ilene Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*,
80 J. Crim. L. & Criminology 883 (1990) 18, 19

Jeffrey S. Parker & Michael K. Block, *The Limits of Federal Sentencing Policy; Or, Confessions of Two Reformed Reformers*,
9 Geo. Mason L. Rev. 1001 (2001).....23

Judge Marvin Frankel, *Keynote Address: Sentencing Guidelines: A Need for Creative Collaboration*,
101 Yale L. J. 2043 (1992).....23

Judy Clarke, *The Sentencing Guidelines: What a Mess*,
55 Fed. Probation 45 (1991) 26

Justice Anthony M. Kennedy, Speech at the ABA Annual Meeting (Aug. 9, 2003) 23

Kate Stith & José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* (1998) 23

Katherine M. Jamieson and Timothy Flanagan, eds., *Sourcebook of Criminal Justice Statistics - 1988*, Department of Justice, Bureau of Justice Statistics, Washington, D.C.: USGPO (1989) 15

Memorandum from James B. Comey, Deputy Attorney General, U.S. Department of Justice, to All Federal Prosecutors, re: Department Policies and Procedures Concerning Sentencing (Jan. 28, 2005) 2

Stephen Breyer, *Federal Sentencing Guidelines Revisited*,
11 Fed. Sent. R. 180 (1999) 16, 22

Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*,
17 Hofstra L. Rev. 1 (1988) 14, 16

Stephen Schulholfer and Ilene Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and its Dynamics in the Post*-Mistretta *Period*,
91 NW. U. L. REV. 1284 (1997) 19

Testimony of Hon. Ricardo H. Hinojosa, before the House Subcommittee on Crime, Terrorism, and Homeland Security (Mar. 16, 2005) 12

U.S. Department of Justice, Bureau of Justice Statistics Bulletin, *Prisoners in 2004* 15

U.S. Sentencing Commission, *2005 Sourcebook of Federal Sentencing Statistics* 10, 17

U.S. Sentencing Commission, *Downward Departures from the Federal Sentencing Guidelines* (2003) 20

U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* (2004) 10

U.S. Sentencing Commission, *Final Report on the Impact of* United States v. Booker *on Federal Sentencing* (Mar. 2006) 26, 27

U.S. Sentencing Commission, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (2004) 24

U.S. Sentencing Commission, *Preliminary Quarterly Data Report, Preliminary Fiscal Year 2006 Data Through September 30, 2006* 2

U.S. Sentencing Commission, *Recidivism and the "First Offender"* (2004) 25

U.S. Sentencing Commission, *Special Post-Booker Coding Project* (July 6, 2006) 2

U.S. Sentencing Commission, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* (1987) 24

INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation with more than 11,200 members nationwide and 28,000 affiliate members in fifty states, including private criminal defense attorneys, public defenders, and law professors. The NACDL seeks to promote the proper administration of justice and to ensure that criminal sentences are imposed and reviewed in a manner that comports with our Constitution. NACDL's intense concern for the fullest protection of fundamental Fifth and Sixth Amendment rights has led it to appear as *amicus curiae* in this Court on numerous occasions, including in *United States v. Booker*, 543 U.S. 220 (2005), *Blakely* v. *Washington*, 542 U.S. 296, 312 (2004) (noting NACDL's position), and *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000).

INTRODUCTION AND SUMMARY OF ARGUMENT

In *United States v. Booker*, 543 U.S. 220 (2005), this Court excised the provision of the Sentencing Reform Act requiring judges to sentence within the Guidelines range "[i]n most cases," *id.* at 234, because the Sixth Amendment prohibits a sentence "outside the range authorized by the jury verdict," *id.* at 240. After *Booker*, the district court chooses a sentence pursuant to 18 U.S.C. § 3553(a)—including its requirement, found in subsection (a)(4), that the court "consider" the applicable Guidelines range—and the court of appeals reviews that sentencing decision for reasonableness.

In the nearly two years since this Court remedied the Sixth Amendment violation in *Booker* by leaving the Guide-

---

[1] This brief was not authored, in whole or in part, by counsel for either party, and no person or entity other than *amici*, their members, and their counsel contributed monetarily to the preparation or submission of the brief. The parties have consented to the filing of the brief and copies of their letters of consent have been lodged with the Clerk of the Court.

lines merely advisory, the Guidelines continue in practice to exert much the same force as before. The Department of Justice's litigation position is that the Guidelines should be applied as if *Booker* had never been decided. By directive from the Attorney General, "prosecutors must actively seek sentences within the range established by the Sentencing Guidelines *in all but extraordinary cases*." Memorandum from James B. Comey, Deputy Attorney General, U.S. Department of Justice, to All Federal Prosecutors, re: Department Policies and Procedures Concerning Sentencing (Jan. 28, 2005) at 2, *available at* http://sentencing.typepad.com/sentencing_law-_and_policy/files/dag_jan_28_comey_memo_on_booker.pdf (emphasis added); *id.* at 1 (prosecutors must "take all steps necessary to ensure adherence to the Sentencing Guidelines"). District judges are imposing Guidelines sentences at nearly the same rate they did when the unconstitutional system was in place.[2]

---

[2] During FY 2003, when departures were reviewed for abuse of discretion, 7.5 percent of defendants received non-government-sponsored below-Guidelines sentences. Frank O. Bowman, *The Year of Jubilee . . . Or Maybe Not: Some Preliminary Observations About the Operation of the Federal Sentencing System After Booker*, 43 Hous. L. Rev. 279, 306 (2006) (Table 3A). Statistics just released by the Commission show that this number increased to only 11.9 percent in FY 2006. U.S. Sentencing Commission, *Preliminary Quarterly Data Report, Preliminary Fiscal Year 2006 Data Through September 30, 2006*, at Table 1, *available at* http://www.ussc.gov/Blakely/Quarter_Report_4Qrt_06.pdf (combining departures and *Booker* variances; also showing that substantial assistance motions and so-called "fast track" dispositions account for almost 90% of government-sponsored downward departures). Significantly, this rate for all of FY 2006 is 0.5 percent *lower* than the rate for the first eight months of the year. U.S. Sentencing Commission, *Special Post-Booker Coding Project*, at 1 (July 6, 2006), *available at* http://www.ussc.gov/Blakely/-PostBooker_060106.pdf (showing 12.4 percent rate of non-government-sponsored below-Guidelines sentences for FY 2006 as of June 1, 2006). This trend is consistent with the "feedback" district judges are receiving from courts of appeals on the limited availability of non-Guidelines sentences even after *Booker*. *See infra*.

Of particular significance in the two cases now before the Court, courts of appeals have continued to give the Guidelines considerable weight by declaring that when a district court imposes sentence within the Guidelines range—a range calculated based on judicial factfinding under a lesser standard of proof—the sentence is presumptively reasonable. *See, e.g., United States v. Johnson*, 445 F.3d 339, 343 (4th Cir. 2006). Several of these courts, echoing the Government's litigation position, have also held that a judge may not vary substantially from such a range absent "extraordinary circumstances." *See, e.g., United States v. Dalton*, 404 F.3d 1029, 1033 (8th Cir. 2005); *United States v. McMannus*, 436 F.3d 871, 874 (8th Cir. 2006) ("the farther the district court varies from the presumptively reasonable guidelines range, the more compelling the justification based on the § 3553(a) factors must be"). As a result of these developments in the reasonableness review standard, many pertinent factors are deemed off-limits because the Sentencing Commission supposedly already has taken them into account. *See, e.g., United States v. Hampton*, 441 F.3d 284, 289 (4th Cir. 2006) (below-Guidelines sentence where defendant was the sole custodial parent of two small children was unreasonable, because "family ties and responsibilities" are an expressly "discouraged factor" under the Guidelines).

There are two fundamental defects with these standards of review. *First*, a requirement of extraordinary circumstances before a judge may substantially vary from the Guidelines range does more violence to the Sixth Amendment than the statute struck down in *Blakely*. The government has defended a Guidelines-centric approach to reasonableness review on the ground that the Guidelines already account for each of the Section 3553(a) factors and purposes a federal judge must consider before imposing sentence. But this Court considered and rejected a remedy that *would* have allowed that approach—factfinding by the jury.

Because judges continue to find facts that determine a Guidelines range, a requirement of extraordinary circum-

stances before a judge may substantially vary from the range suffers the same constitutional infirmity that led this Court to invalidate the mandatory Guidelines in *Booker*. This is because the difference between a Guidelines range based on judicial factfinding and the range authorized by the jury's findings can be considerable. *See, e.g.*, *Booker*, 543 U.S. at 228 (judicial factfinding increased the authorized sentence for Fanfan from a maximum of 78 months to a range of 188 – 235 months). Under the Washington law struck down in *Blakely v. Washington*, 542 U.S. 296 (2004), the judge was merely *allowed* to impose a sentence exceeding the maximum authorized by "facts reflected in the jury verdict or admitted by the defendant." *Id.* at 303. But to forbid substantial deviation from the Federal Guidelines range absent extraordinary circumstances is more detrimental to the defendant's Sixth Amendment rights than the Washington provision. The federal judge's findings of fact under the preponderance standard would *require* imposition of a sentence greater than that authorized by the jury's findings unless *the defendant* carries the burden of proving extraordinary mitigating circumstances. In the typical case—*i.e.*, one where extraordinary mitigating circumstances are not present—the result *must* be a sentence that "the jury's verdict alone does not authorize." *Id.* at 305. Such a "remedy" is foreclosed by the Sixth Amendment. *Booker*, 543 U.S. at 234 (holding mandatory Guidelines unconstitutional because "the judge is bound to impose a sentence within the Guidelines range" in "most cases").

Second, even if *Blakely* and *Booker* could permit a system that heavily relies on class-wide parameters devised by an administrative agency, the empirical bases for both the "extraordinary circumstances" requirement and a presumption of reasonableness for Guidelines sentences (*i.e.*, the notion that the Commission has already accounted for all of the required factors and purposes in its Guidelines ranges) are demonstrably false. The Sentencing Commission decided it was not feasible to construct a system producing sentences designed to achieve the purposes of sentencing listed in Sec-

tion 3553(a)(2). Moreover, the Commission did not, because it could not, implement a system that differentiates between particular defendants based on the Section 3553(a) factors, most notably differences in the "history and characteristics" of otherwise similarly-situated defendants. *See* 18 U.S.C. § 3553(a)(1). Thus, there is no basis *in fact* for a court of appeals to presume that a sentence within the Guidelines range is reasonable or to require extraordinary circumstances before a judge may substantially vary from it.

The proper formulation of reasonableness review—a formulation that complies with the Sixth Amendment, is true to the language of the Sentencing Reform Act, and recognizes the limitations inherent in the Guidelines—is one that focuses on whether the district judge considered *all* of the statutory factors as they apply to that *particular* case. The court of appeals should also examine whether the judge, after considering those factors, complied with the duty to impose a sentence sufficient, but "not greater than necessary" to achieve the statute's purposes. 18 U.S.C. § 3553(a). This inherently individualized process is not aided by artificial generalizations about the appropriateness of a sentence range that was created for classes of cases and that was the product of an incomplete assessment of the very factors and purposes *judges* must consider on a case-by-case basis. To be faithful to the remedy in *Booker*, and in recognition of the inherent limitations of the Guidelines, neither the district courts nor the courts of appeals should give special weight to sentences that fall within the applicable Guidelines range.

ARGUMENT

I. A Requirement Of Extraordinary Circumstances For Substantial Variances From The Guidelines Is Inconsistent With This Court's *Booker* Decision.

The Eighth Circuit's principal basis for giving the Guidelines greater weight than the other Section 3553(a) fac-

tors—that they supposedly "were fashioned taking the other § 3553(a) factors into account and are the products of years of careful study," *United States v. Claiborne*, 439 F.3d 479, 481 (8th Cir. 2006)—misses the point of *Booker*. This Court made clear that "the mandatory system" Congress enacted "is no longer an open choice." 543 U.S. at 263. The Court rejected the proposed remedy of jury factfinding, which would have allowed the Guidelines to retain their primary role in the sentencing process. Because judges continue to make the factual findings that determine a Guidelines range (or that permit deviation from it), the range must be no more than one factor among many that the judge should consider. Forbidding substantially higher or lower sentences absent a finding of extraordinary circumstances would reinstate a regime in which the Guidelines nearly always receive dispositive weight—a result irreconcilable with the Sixth Amendment right to jury findings.

The state law in *Blakely* limited a defendant's sentence to a "standard range," dictated by the offense of conviction, unless the judge found "substantial and compelling reasons justifying an exceptional sentence." 542 U.S. at 299. This Court held that a sentence above the standard range, based on the judge's finding that Blakely had acted with deliberate cruelty, violated the Sixth Amendment because it exceeded the penalty the judge could impose "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Id.* at 303 (emphasis omitted).

A requirement that a judge find the existence of extraordinary circumstances before imposing a sentence substantially above or below the presumptively reasonable Guidelines range suffers the same flaw that led this Court to vacate Blakely's sentence. Under the Eighth Circuit's test, a district court may not substantially deviate from the Guidelines range unless the judge finds facts that establish extraordinarily aggravating or mitigating circumstances. The less aggravating the circumstances found by the judge, for example, the lower the permissible increase in sentence. *See Claiborne*, 439

F.3d at 481 ("How compelling [the] justification must be is proportional to the extent of the difference between the advisory range and the sentence imposed."). It does not matter, for Sixth Amendment purposes, that judges have the flexibility to vary substantially from the range in *some* cases without making further factual findings. This Court held as much in invalidating the provision that made the Guidelines mandatory. *Booker*, 543 U.S. at 234 ("The availability of a departure in specified circumstances does not avoid the constitutional issue, just as it did not in *Blakely* itself.") By definition, the circumstances in the majority of cases governed by a particular Guideline are not extraordinary, just as departures under the mandatory Guidelines were unavailable in "most cases." *Id.*[3]

The facts in *Booker* and *Fanfan* also illustrate the Sixth Amendment violation. Judicial factfinding increased Fanfan's penalty from a Guidelines range of 63 – 78 months to a range of 188 – 235 months. 543 U.S. at 228. Under a standard of review that is tied to the range determined under the Guidelines, a defendant such as Fanfan could receive a sentence at the higher range—a sentence substantially above the

---

[3] It may well be that in theory a "presumption of reasonableness" for Guidelines sentences, by itself, does not raise these Sixth Amendment concerns if it it does not necessarily equate with a "presumption of *unreasonableness*" for *non*-Guidelines sentences. In practice, however, the two have gone hand in hand. *See, e.g., United States v. Bishop*, 2006 WL 3237027 at *10 (10th Cir. Nov. 9, 2006); *United States v. Rogers*, 448 F.3d 1033, 1034 (8th Cir. 2006) (per curiam); *United States v. Johnson*, 427 F.3d 423, 426-27 (7th Cir. 2005). To be unobjectionable, any presumption on appeal must be limited to cases where the judge has followed the correct process—considering all factors and exercising his discretion to impose a sentence sufficient, but not greater than necessary to meet the purposes of Section 3553(a)(2). But if the district judge has improperly considered the Section 3553(a) factors by, for example, giving special weight to the Guidelines, the resulting sentence is not entitled to a presumption of reasonableness whether it is within the Guidelines or not. *Cf. Koon v. United States*, 518 U.S. 81, 100 (1996) ("A district court by definition abuses its discretion when it makes an error of law.").

range authorized by the jury verdict—*only* if the judge makes additional findings. Thus, for the "ordinary" or typical defendant—one whose circumstances fall short of "extraordinary"—the district court not only is *permitted* to impose a sentence greater than that available based on jury findings alone; it is *required* to do so. The Sixth Amendment forbids either result. *See Blakely*, 542 U.S. at 305 n.8 ("Whether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence." (emphasis in original)).

Claiborne involves a downward variance, but there is no reason to think that reasonableness review should mean one thing for upward variances and another for downward variances. *Booker* held to the contrary. 543 U.S. at 266 (rejecting the government's remedy because it "would impose mandatory Guidelines-type limits upon a judge's ability to *reduce* sentences, but it would not impose those limits upon a judge's ability to *increase* sentences" and "[w]e do not believe that such 'one-way lever[s]' are compatible with Congress' intent" (emphases and second alteration in original; citation omitted)).

The constitutional defect is further illustrated by considering how reasonableness review would apply to a sentence that is *at or above* the top of the range determined solely on the basis of facts found by the jury or admitted by the defendant, even though it may be *below* the range determined after additional findings by the judge. After *Booker* and *Blakely*, a district judge operating in a guidelines regime that uses judicial factfinding must have the discretion to impose such a sentence without the additional requirement that he go beyond the jury's findings. Thus, in such a case the sentence must be affirmed if the judge follows the statute's procedural requirements, complies with the Due Process Clause, and does not consider factors forbidden by the Constitution (such as the defendant's race). The sentence may not be reversed on the ground that there were insufficient mitigating factors. Reasonableness review must therefore give judges broad lati-

tude in choosing a sentence—a latitude that is inconsistent with the substantive requirement of extraordinary circumstances.[4]

Reasonableness review cannot mean one thing in cases where the judge's findings produce little or no increase in the Guidelines range and another thing when the range greatly exceeds that based on jury findings alone.[5] A unitary standard of reasonableness review must provide sufficient latitude to account for cases like Booker's and Fanfan's, where judicial factfinding and jury factfinding producing significantly different ranges. And although the need for such latitude would be the same even if such cases were rare, they are not. In drug cases, the "base" offense level is determined largely by the quantity of drugs deemed "relevant" under rules set forth in the Guidelines. U.S. SENTENCING GUIDELINES MANUAL ("USSG") § 1B1.3. This "relevant"

---

[4] This Court has held that judges may find facts that trigger a mandatory minimum sentence. *See Harris v. United States*, 536 U.S. 545 (2002). Even assuming that holding survives *Blakely* and *Booker*, *see Harris*, 536 U.S. at 569 (Breyer, J., concurring) (acknowledging that *Apprendi* "cannot easily" be distinguished), *Rangel-Reyes v. United States*, 547 U.S. __ (2006) (Stevens, J., statement respecting denial of petitions for writ of certiorari), it does not apply here, because judicial factfinding changes in tandem *both* the minimum *and* the maximum allowable sentence under the Guidelines. *Cf. Harris*, 536 U.S. at 557 (distinguishing *Apprendi*, because under 18 U.S.C. § 924(c), "the jury's verdict has authorized the judge to impose the minimum with or without the finding"; *Apprendi* does not apply to "a fact increasing the mandatory minimum (but not extending the sentence beyond the statutory maximum)"); *id.* at 561 ("The minimum may be imposed with or without the factual finding; the finding is by definition not 'essential' to the defendant's punishment.")

[5] Nothing in the statute or *Booker* contemplates that the meaning of "reasonable" will depend on the extent of the difference between the range based on jury findings and the range based on judicial findings. Moreover, a standard that varies in such a way would impose undue burdens on the lower courts and be exceedingly difficult to administer consistently in a system with 256 Guidelines range cells.

quantity includes drugs involved in counts that were dismissed, and even counts of which the defendant was acquitted or for which there was no charge at all. *See, e.g., United States v. Watts*, 519 U.S. 148 (1997) (per curiam). Moreover, the Guidelines Manual contains many more levels of gradation for drug quantity than does the statute defining the offense. *Compare* 21 U.S.C. § 841(b)(1) (containing three levels of penalty gradation due to drug quantity for most controlled substances, including cocaine, cocaine base (crack), heroin and marijuana) *with* USSG § 2D1.1(c) (containing at least 14 different offense levels for such drugs).[6] Approximately 35 percent of all federal sentences in 2005 were for drug offenses. U.S. Sentencing Commission, *2005 Sourcebook of Federal Sentencing Statistics* ("2005 Sourcebook") at 13; *id.* at 313 (showing an increase in the percentage of drug cases after *Booker*). Many other Guidelines also dictate higher sentence ranges based on findings made by the judge rather than the jury, not the least of which are those for theft and fraud cases. *See* USSG § 2B1.1 (numerous aggravating factors incorporating the amount of loss); *2005 Sourcebook* at 13 (12 percent of cases).

Petitioner Rita's case illustrates how another type of judicial factfinding under the Guidelines—in which the judge uses a "cross reference" to sentence the defendant *as if* convicted of a *different* offense—can significantly increase the Guidelines range. Rita was convicted of perjury, false statements, and obstruction of justice. His offense level based on jury findings was 14. *See* USSG §§ 2J1.2 (obstruction of jus-

---

[6] The Guidelines, rather than mandatory minimums, dictate the sentence in a large number of drug cases. *See* U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* ("*Fifteen Year Report*"), at 54 (2004), *available at* http://www.ussc.gov/15_year/15year.htm (determining that, as of 2001, more than 25 percent of the average expected prison time for drug offenders can be attributed to Guideline increases above the statutory mandatory minimum penalty levels).

tice) & 2J1.3 (perjury). But after the government's post-conviction proffer, accepted by the Probation Officer and subject to proof by only a preponderance of the evidence, Rita's Guidelines range was calculated as if he had been convicted of accessory after the fact to an offense that the grand jury was investigating—the purportedly illegal importation of goods by the company from which Rita made purchases—but with which Rita was never charged.

As Rita's brief explains, this cross reference to an offense supposedly committed by a non-party—an offense that was not at issue, much less proved, in Rita's trial—increased his offense level from 14 to 20, doubling both the minimum and maximum of his Guidelines range. With the type of reasonableness review adopted by several circuits, the jury findings alone—supporting a sentence of between 15 and 21 months—would not have authorized a sentence in the enhanced range used by the district judge. To get to that higher range a judge would need to make additional findings—either facts that change the Guidelines range or facts that support a finding of "extraordinary circumstances." Thus, "[t]he sentencing judge would have been reversed" had he imposed a sentence in that higher range without additional non-jury findings. *See Booker*, 543 U.S. at 234-35; *cf. id.* at 234 (noting that the statute in *Blakely* did not provide sufficient flexibility because the judge needed to find "substantial and compelling reasons" to vary from the range). This is precisely the type of sentencing regime that this Court invalidated as unconstitutional in *Booker* and *Blakely*.

On constitutional grounds alone, the standard of review used in the Fourth and Eighth Circuits must be rejected.

II. The History Of The Guidelines Demonstrates That Courts Should Neither Give Them A Presumption Of Reasonableness Nor Require Extraordinary Circumstances For Substantial Variances.

As noted earlier, the Eighth Circuit's presumption of reasonableness for all within-Guidelines sentences is grounded in the belief that the Guidelines take the other Section 3553(a) factors into account and are "the product of years of careful study." 439 F.3d at 481. Even if it were possible after *Booker* to give the Guidelines special weight, the premises on which the court have done so are demonstrably false. The Guidelines were not written to produce sentence ranges that meet all of the purposes of sentencing found in Section 3553(a)(2), much less do they differentiate individual defendants from one another based on all of the other factors a judge must consider under Section 3553(a). And while it is true that the Commission's amendment process was designed to carry out a continued refinement of the Guidelines to better approach the ideal regime envisioned by the drafters of the Sentencing Reform Act, in practice it has not performed in that manner. Rather than move the Guidelines in the direction of balancing and incorporating Section 3553(a)'s purposes and factors, the amendment process has had the opposite effect. Thus, as an empirical matter, sentence ranges that are the product of such a process are not entitled to a presumption of reasonableness.

A. The Sentencing Guidelines And The Ranges They Produce For Individual Cases Do Not Incorporate All Of The Sentencing Purposes Or Factors Set Forth In 18 U.S.C. § 3553(a).

The Commission's current Chairman has recently declared that the Guidelines embody each of the sentencing factors set forth in 18 U.S.C. § 3553(a) for every offense and every offender. *See* Testimony of Hon. Ricardo H. Hinojosa,

before the House Subcommittee on Crime, Terrorism, and Homeland Security (Mar. 16, 2005), at 18, *available at* http://judiciary.house.gov/media/pdfs/hinojosa031606.pdf ("The guidelines embody all of the applicable sentencing factors for a given offense or offender.") That simply is not so. The Commission itself acknowledged, when first promulgating the Guidelines, that it was impossible to devise a guidelines system that captures and accounts for "the vast range of human conduct potentially relevant to a sentencing decision." USSG ch. 1, pt. A(4)(b) (1987). "[T]he guidelines are inescapably generalizations" that "say little about the 'history and characteristics of the defendant.'" *United States v. Jiménez-Beltre*, 440 F.3d 514, 527 (1st Cir. 2006) (Lipez, J., dissenting). The Guidelines are entitled to no special weight because they *do not*—and indeed *cannot*—produce sentence ranges that account for each of the various factors and purposes a court must consider when imposing sentence.

1. The Sentencing Guidelines were not written to ensure that a within-Guidelines sentence complies with the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2).

Section 3553(a)(2) of Title 18 requires judges to impose sentences that, among other things, "comply with" the following "purposes" of sentencing in each particular case: "reflect the seriousness of the offense"; "promote respect for the law"; "provide just punishment for the offense"; "afford adequate deterrence to criminal conduct"; "protect the public from further crimes of the defendant"; and "provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." The Act directed the Commission to devise Guidelines appropriate for "categories of offenses," 28 U.S.C. § 994(c), and "categories of defendants," *id.* § 994(d), recognizing that guidelines could not address the circumstances of every individual. The Guidelines were to be addressed to the purposes of sentencing and the reduction of

unwarranted disparities." *Id.* § 994(f). The sentencing judge, by contrast, was to consider those same matters, 18 U.S.C. § 3553(a)(2), (4), (5), (6), *and also* "the nature and circumstances of the offense" and the "history and circumstances of the offender." 18 U.S.C. § 3553(a)(1).

In the introduction to the first Guidelines Manual in 1987, the Commission acknowledged it was unable to take each of these purposes of sentencing into account in crafting Guidelines ranges. *See* USSG ch. 1, pt. A(3) (1987). The Commission only considered trying to account for two purposes, which it described as "just deserts" [sic] and "crime control." *Id.* It candidly acknowledged, however, that because it was unable to tackle the "profoundly difficult" "philosophical problem" of reconciling the interplay of even *those* two sentencing purposes, *id.*, it simply abandoned their use in favor of a system based "by and large, [on] typical past practice, determined by an analysis of 10,000 actual cases." Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 7 (1988) (footnote omitted). As another original commissioner explained, "[r]ather than being guided by the statutory purposes of sentencing, the guideline drafting reflected simply a haphazard 'fiddling with the numbers' that established the guidelines sentences." *Dissenting View of Commissioner Paul H. Robinson on the Promulgation of Sentencing Guidelines by the United States Sentencing Commission*, 52 Fed. Reg. 18,121, 18,122 (May 1, 1987).

In the end, the Commission chose to increase sentences for some offenses, but not others, through a series of "'trade-offs' among Commissioners with different viewpoints." Breyer, 17 Hofstra L. Rev. at 19; *id.* at 23 ("[O]nce the Commission decided to abandon the touchstone of prior past practice, the range of punishment choices was broad").[7] Al-

---

[7] Over time, these "trade-offs" have worked to substantially lengthen sentences. Defendants sentenced in 2002 will spend, on average, twice as long in prison as those sentenced prior to the Sentencing Reform Act.

(footnote continued on next page)

though the Commission may very well have done the best it could under the circumstances, it is abundantly clear that the ranges in that Manual are *not* the product of a balancing of the sentencing purposes every judge is required to consider under Section 3553(a)(2).

2. The Guidelines ranges do not account for important Section 3553(a) factors.

In addition to their failure to take account of—much less carefully balance—each purpose of sentencing listed in Section 3553(a)(2), the Guidelines also fail to differentiate between defendants with respect to the other Section 3553(a) factors that judges must consider. Of particular note, they do not do so with respect to a vital component of subsection (a)(1)—the "history and characteristics of the defendant."

From the beginning, the Guidelines have produced sentencing ranges that take into account one narrow slice of a defendant's "history and characteristics": the aggravating factor of prior criminal history. *See generally* USSG ch. 4. The Guidelines ranges do not incorporate any other offender characteristics or any other aspects of their history. Instead, to the extent the Commission has addressed these factors, it expressly discourages or outright prohibits judges from considering them when computing a Guidelines range or when

---

(*footnote continued from previous page*)

Fifteen Year Report at 46, 47, and 49. As a result, the federal prison population has increased four-fold during that same period. *Compare* Katherine M. Jamieson and Timothy Flanagan, eds., *Sourcebook of Criminal Justice Statistics - 1988*, Table 6.34, Department of Justice, Bureau of Justice Statistics, Washington, D.C.: USGPO (1989) *with* Federal Bureau of Prisons, Quick Facts, *available at* http://www.bop.gov/news/quick.jsp#1. In fact, despite Congress's directive that the Guidelines "shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons," 28 U.S.C. § 994(g), as of 2004 the federal prisons were 40% over capacity. U.S. Department of Justice, Bureau of Justice Statistics Bulletin, *Prisoners in 2004* at 7, *available at* http://ojp.usdoj.gov/-bjs/pub/pdf/p04.pdf.

deciding whether to impose a Guidelines sentence. These characteristics include, among others, family ties and obligations, USSG § 5H1.6, military service, *id.* at § 5H1.11, community good works, *id.*, addictions and other dependencies, *id.* at § 5H1.4, and duress relating to "personal financial difficulties and economic pressures upon a trade or business," *id.* at § 5K2.12. The original commissioners "extensively debated" whether the Guidelines ranges should be affected by offender characteristics beyond the defendant's criminal record, Breyer, 17 Hofstra L. Rev. at 19, but they were unable to reach a consensus and therefore decided "to leave other characteristics out." Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent. R. 180, 185 (1999).

The Commission's inability to incorporate these offender characteristics into the computation of a Guidelines range is not surprising, because guidelines can only go so far in producing ranges that take these considerations into account. The one factor the Commission did incorporate—prior criminal history—is, in a number of ways, susceptible to an objective formula based on the number of prior convictions, the recency of past offenses, and their severity (as measured by length of sentence imposed or served). It is *not* possible to quantify in a meaningful way—*i.e.*, one that differentiates defendants in the current grid of sentence ranges—such factors as a defendant's family obligations; the influence of addiction, duress, or financial difficulties on the commission of the offense; or the degree to which the defendant engaged in good works before or after committing the offense. Moreover, an offender characteristic that warrants a significant sentence reduction in one case (*e.g.*, a history of strong family ties and responsibilities) might be less compelling than otherwise would be the case if coupled with other factors (*e.g.*, the defendant made a calculated decision to entice close family members into joining his criminal activity despite having a strong support system that gave him ample opportunity to lead a law-abiding life). Because the weight to be given any particular offender characteristic requires careful case-by-case consideration of the interplay of multi-

ple factors, such characteristics are inherently unsuited to the generalizations required in any guidelines system.

As a result of the difficulty in accounting for offender characteristics in a system that must quantify and generalize factors, with the exception of the aggravating factor of criminal history the Guidelines are focused *entirely* on the offense as opposed to the person who committed it. But even there they frequently fail to differentiate based on such things as criminal intent.[8] To the extent intent is considered, it works in only one direction. Intended harms increase the sentence even if they do not occur. *See, e.g.*, USSG § 1B1.3(a)(3) (relevant conducts includes "all harm that was the object" of acts and omissions) & 2D1.1. cmt. n.12 (drug quantity includes amounts attempted or agreed upon). Yet no reduction is made to account for harms that were unintended or controlled by law enforcement. *See, e.g., id.* (addressing controlled drug deliveries); *United States v. Emmenegger*, 329 F. Supp. 2d 416, 427-28 (S.D.N.Y. 2004) (noting that loss amount in many fraud cases "is a kind of accident" and thus a "relatively weak indicator of the moral seriousness of the offense or the need for deterrence"). In failing to differentiate between defendants based on these and other aspects of their offenses, the Guidelines cannot be said to already account for the factors in Section 3553(a)(1).

---

[8] Several guideline provisions require rigid arithmetic increases for acts that were committed (including the resulting "harm") without regard to *mens rea*. For example, the Guideline for unlawful possession of a firearm, used in 10.6 percent of all federal criminal cases, *2005 Sourcebook* at 60, mandates a two-level increase if the firearm illegally possessed by the defendant "was stolen," and a four-level increase if it "had an altered or obliterated serial number," USSG § 2K2.1(b)(4), "whether or not the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number," *id.* at cmt. n.8(B). *See also id.* at § 2J1.2(b)(1)(B) (compelling the same twelve-level increase for defendants who know their false statements were made in connection with a terrorism investigation and those who were unaware of the nature of the investigation).

Another statutory factor that judges must consider is "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). Minimizing such disparities was one of the primary objectives of the Sentencing Guidelines. Guidelines, at least in theory, enable judges to give the same weight to factors common to "categories" of defendants who commit the same crime in the same manner. *See* 28 U.S.C. §§ 991(b)(1)(B) & 994(d), (f). For example, all bank robbers start at a single base offense level. And, all other things being equal, the defendant who commits his offense in a more aggravated manner than others (such as injuring a teller during the robbery) is placed in a higher range. But in a number of ways the Guidelines have perpetuated and even aggravated the problem of unwarranted disparities.

As the Sentencing Commission has recognized, "unwarranted disparity" means the "different treatment of *individual* offenders who are similar in relevant ways, or similar treatment of *individual* offenders who differ in characteristics that are relevant to the purposes of sentencing." *Fifteen Year Report* at 113 (emphasis in original). The Guidelines, by limiting consideration of numerous factors and circumstances (including the offense and offender factors mentioned above), have increased the second type of unwarranted disparity—the like treatment of cases that are not truly alike. Ilene Nagel, one of the original commissioners, acknowledged this problem—she dubbed it the "overreaching uniformity" of the Guidelines—noting that "the emphasis [in creating the first set of guidelines] was more on making sentences alike, and less on insuring the likeness of those grouped together for similar treatment." Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. Crim. L. & Criminology 883, 934 (1990).

The Guidelines also suffer severe shortcomings in addressing the other type of disparity—different treatment of individual offenders who are similar in relevant ways. One of the biggest causes of *this* type of disparity is the practice

of charge and fact bargaining in connection with guilty pleas. Numerous studies have confirmed that because such bargaining occurs in a sizable number of cases, Guidelines ranges for defendants who should be identical in the eyes of the Guidelines will often be different. For example Professor Stephen Schulhofer and former-Commissioner Nagel found that the Guidelines were circumvented in approximately twenty to thirty-five percent of all plea-bargains, Ilene Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and its Dynamics in the Post-*Mistretta *Period*, 91 NW. U. L. REV. 1284, 1290 & n.25 (1997), with the extent of the deviations from appropriate guideline calculations ranging between "modest" (ten to twenty-five percent) and "enormous" (seventy to ninety percent), *id.* at 1292. Similarly, the federal probation offices in forty-three percent of all districts report that when "guideline calculations are set forth in a plea agreement, they are supported by offense facts that accurately and completely reflect all aspects of the case" *no more than half* the time. *Fifteen Year Report* at 86 (internal quotations and citations omitted). And in yet another survey, this one conducted by the Federal Judicial Center, three-quarters of district judges reported that plea bargaining is a "source of hidden unwarranted disparity in the guidelines system." Federal Judicial Center, *The U.S. Sentencing Guidelines: Results of the Federal Judicial Center's 1996 Survey* at 7, 9 (1997), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/gssurvey.pdf/$File/gssurvey.pdf.

Ironically, it is the so-called "real offense" provisions (*e.g.*, the weapon and quantity enhancements in drug cases and the loss amount for economic crimes)—the centerpiece of guidelines sentencing, *see, e.g.*, *Fifteen Year Report* at 24-25—that provide the most fertile ground for abusive plea negotiating tactics. *See* Nagel, 80 J. Crim. L. & Criminology at

937.[9] The Justice Department's continued insistence after *Booker* that prosecutors avoid sentences outside the ranges that have been computed, and standards of review that treat non-Guidelines sentences as suspect, can only serve to perpetuate this form of disparity.

Perhaps the most troubling manifestation of unwarranted sentencing disparity prevalent in the current guidelines system is the gap between average sentences of white and minority offenders. "[R]elatively small in the preguidelines era," this gap has grown substantially since the advent of the Guidelines. *Fifteen Year Report* at 115, 116, 120-27. The Commission itself has concluded that these disparities are not "a product of racial stereotypes, prejudice, or other forms of discrimination on the part of judges"; rather they are attributable to an "'*institutional unfairness*' *built into the sentencing rules themselves.*" *Id.* at 135 (emphasis added) (internal citation omitted). Although the Commission specifically identified the 100:1 quantity ratio for powder and crack cocaine—a ratio that substantially increased petitioner Claiborne's Guidelines range—and the career offender Guideline as rules that have "unwarranted adverse impacts on minority groups without clearly advancing a purpose of sentencing," it acknowledged there may be "many others." *Id.* at 131-34. A Guidelines system that *increases* racial disparities in sentencing cannot be given a presumption of reasonableness.

---

[9] Further aggravating the disparities inherent in plea bargaining is the existence of regional "'adaptations' to the guidelines system," including "fast-track" disposition programs. *Fifteen Year Report* at 86; *see also* U.S. Sentencing Commission, *Downward Departures from the Federal Sentencing Guidelines*, at 66-67 (2003), *available at* http://www.ussc.gov/departrpt03/departrpt03.pdf ("Defendants sentenced in districts without authorized early disposition programs . . . can be expected to receive longer sentences than similarly-situated defendants in districts with such programs. This type of geographical disparity appears to be at odds with the overall Sentencing Reform Act goal of reducing unwarranted disparity among similarly-situated offenders.")

Congress recognized that judges would need to consider more than the kinds of unwarranted disparity against which Guidelines can protect. It thus required them to "consider" the problem of disparity, 18 U.S.C. § 3553(a)(6), *in addition to* consideration of the Guidelines range, in each individual case. The assumption that the Guidelines account for this and other Section 3553(a) factors thus cannot be squared with the structure of the statute, any more than it can be squared with the way the Guidelines have been created.

B. The History Of The Guideline Amendment Process Has Further Undermined Any Argument For A Presumption Of Reasonableness.

The second reason advanced by the Eighth Circuit in *Claiborne* for according within-Guidelines sentences a presumption of reasonableness was that the Guidelines have been refined over time based on several years of sentencing experience and studies. 439 F.3d at 481. While Congress, the Commission, and even this Court envisioned such a data-driven evolution of the Guidelines, *see Mistretta v. United States*, 488 U.S. 361, 379 (1989); 28 U.S.C. § 994(o), in practice the amendment process has proven incapable of incorporating Section 3553(a)'s purposes and other sentencing factors into the Guidelines.

When the original Commission determined it could not base its Guidelines ranges on a principled application of the statutory purposes of sentencing listed in Section 3553(a)(2), it intended to make up for that shortcoming in later revisions to the Manual. The Commission saw its original product as "but the first step in an evolutionary process." USSG ch. 1, pt. A(3) (1987). The Guidelines were to be refined along two fronts by: (1) incorporating the findings of the Commission's "continuing research, experience, and analysis," *id.* at pt. A(2); and (2) developing a sentencing "common law," whereby judges would "remain free to depart from the Guidelines' categorical sentences," transmitting their reasons for doing so to the Commission, which would then revise the

Guidelines to incorporate the common practices of the judiciary. Breyer, 11 Fed. Sent. R. at 183, 185 (the original choices were to be "subject to revision in light of Guideline implementation experience"); *see also Booker*, 543 U.S. at 263. Experience, however, has not measured up to expectations.

1. Changes to individual provisions have not addressed the failure of the Guidelines to account for and balance the multiple statutory purposes of sentencing.

The Commission's plan to incorporate the purposes of sentencing into later versions of the Guidelines Manual was doomed from the start. The tradeoffs stemming from the original commissioners' failure to reach consensus resulted in a system bereft of a coherent sentencing philosophy, much less one that bore some relationship to the purposes of sentencing set forth in the Sentencing Reform Act. "Without an agreement on the purposes of sentencing, there was no way for the Commission to measure sentences against particular objectives." *United States v. Jaber*, 362 F. Supp. 2d 365, 374 (D. Mass. 2005). The Commission has made a number of separate amendments to individual Guidelines, but it has yet to make the kind of structural changes needed to implement the statutory purposes of sentencing. In fact, the amendment process has been notable for its relentless addition of factors that serve to increase offense levels and further restrict the ability of judges to consider, among other things, the history and characteristics of defendants.

The Guidelines have been amended 696 times. USSG App. C (2006). Only a handful of these changes have operated to decrease the length of certain sentences. *See* Amy Baron-Evans, *The Continuing Struggle for Just, Effective, and Constitutional Sentencing After* United States v. Booker*: Why and How the Guidelines Do Not Comply with § 3553(A)*, 30 Champion 32 at n.39 (2006) (identifying only seven such amendments: USSG App. C, amends. 396, 488,

515, 590, 624, 632, and 634). The cumulative effect of the remaining changes has been a "one-way upward ratchet" in sentencing, Frank O. Bowman, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315, 1319-20 (2005), a result roundly criticized.[10]

This consistent increase in the length of prison sentences has not been accompanied by empirical data that tie the increases to the purposes of sentencing. *See* Kate Stith & José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* at 56 (1998) ("Nowhere in the forest of directives that the Commission has promulgated over the last decade can one find a discussion of the rationale for the particular approaches or definitions adopted by the Commission; nor can one find any efforts to justify the particular weights it has elected to assign to various sentencing factors."). Even the criminal history provision—the single offender characteristic accounted for in the Guidelines—does not produce results that can be presumed "reasonable." Due to "pressing congressional deadlines," the Commission was unable to validate its criminal history measure with its own

---

[10] *See, e.g.*, *Fifteen Year Report* (Sentencing Commission) at 137-38 (discussing the negative impact of "factor creep" on the Commission's efforts to tie offense levels to offense seriousness); Jeffrey S. Parker (Former Deputy Chief Counsel to the Commission) & Michael K. Block (Former Commissioner), *The Limits of Federal Sentencing Policy; Or, Confessions of Two Reformed Reformers*, 9 Geo. Mason L. Rev. 1001, 1019 (2001) (noting that the Commission has lapsed into enacting "gratuitous increases in punishment levels that ha[ve] no basis in either principle or practice, and instead [are] essentially political decisions reflecting responses to interest group pressures"); *id.* at 1033-34; Judge Marvin Frankel, *Keynote Address: Sentencing Guidelines: A Need for Creative Collaboration*, 101 Yale L. J. 2043, 2046 (1992) ("I think everyone here knows that the judges find the guidelines excessively harsh and rigid . . . . The guidelines are indeed severe . . . ."); Justice Anthony M. Kennedy, Speech at the ABA Annual Meeting at 4 (Aug. 9, 2003) ("The Federal Sentencing Guidelines should be revised downwards."), *available at* http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html.

empirical studies. U.S. Sentencing Commission, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* ("*Measuring Recidivism Report*") at 1 (2004), *available at* http://www.ussc.gov/publicat/recidivism_general.pdf. Instead, it relied on a hodge-podge of preexisting tools, reasoning that their combined predictive power would transfer, "at least in part, to the nascent guidelines' criminal history measure." *Id.* The Commission intended to follow up with its own research to test the correlative value between its criminal history scoring system and recidivism. U.S. Sentencing Commission, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* at 44 (1987).

The Commission conducted and publicized this promised analysis seventeen years later. *See Measuring Recidivism Report*. It demonstrates in quite compelling fashion that many of the offender characteristics the Commission has ruled off-limits—age, educational level, employment status, and so on—are indeed strong predictors of recidivism rates. *See id.* at 16 ("Investigations using the recidivism data suggest that there are several legally permissible offender characteristics which, if incorporated into the criminal history computation, are likely to improve predictive power.").[11] Yet the ranges computed under the Guidelines do not account for any of these offender characteristics.[12]

---

[11] For example, the Commission found that recidivism rates are strongly correlated to age (35.5% for offenders under 21 versus 9.5% for offenders over 50), educational level (31.4% for offenders with less than a high school education versus 8.8% for offenders with a college degree), employment status (32.4% for offenders who were not steadily employed in the year before their arrest versus 19.6% for offenders who were steadily employed during this period), and marital status (31.4% for offenders who were never married versus 13.8% for married offenders and 19.5% for offenders who were formerly married). *Id.* at 12-14.

[12] The problem is magnified by the Commission's initial decision to deviate upward from the "historical averages" for a particular category of defendants—those who had previously received probationary sentences

(*footnote continued on next page*)

2. The Sentencing Guidelines have not been refined to reflect developments in the sentencing "common law."

The development of the sentencing "common law" has also fallen short of expectations, largely because the Commission has favored like treatment of dissimilar cases over a system that gives district judges the flexibility to take all factors into account. In the early years of Guidelines sentencing, judges began the dialogue envisioned by the original Commission by departing from the Guidelines where the ranges did not adequately account for the individualized circumstances of the cases before them. But, as one commentator recently noted, "the idea that feedback from front-line sentencing actors is an important component of the federal sentencing model has somehow been lost. Instead, . . . sentences outside the otherwise applicable guidelines range have come to be viewed as illegitimate, even deviant." Bowman, 43 Hous. L. Rev. at 321.

Contributing in no small part to this development was the Commission's reaction to the initial feedback it received from sentencing judges. At least three times during the early years of the Guidelines, the Commission adopted amendments that discouraged, or outright prohibited, departures in reaction to sentences imposed in one or two isolated cases. *See* Douglas A. Berman, *Distinguishing Offense Conduct and*

(*footnote continued from previous page*)

for "certain economic crimes," USSG ch. 1, pt. A(4)(d) (1987)—notwithstanding Congress's directive that the Guidelines "reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." *See* 28 U.S.C. § 994(j). Although the Commission's own findings from the recidivism data support the creation of a "first offender" criminal history category that would carry out the directive in Section 994(j), *see* U.S. Sentencing Commission, *Recidivism and the "First Offender"* (2004), *available at* http://www.ussc.gov/publicat/Recidivism_FirstOffender.pdf., the Guidelines have not been amended to do so.

Offender Characteristics in Modern Sentencing Reforms, 58 Stan. L. Rev. 277, 284 & n.33 (2005) (tracing the 1991 amendment to § 5H1.4, which discourages departures based on "[p]hysical condition or appearance," to *United States v. Lara*, 905 F.2d 599 (2d Cir. 1990), and the 1992 addition of § 5H1.12, which prohibits departures based on "[l]ack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing," to *United States v. Floyd*, 956 F.2d 203 (9th Cir. 1991)); Judy Clarke, *The Sentencing Guidelines: What a Mess*, 55 Fed. Probation 45 (1991) (tracing the 1991 addition of § 5H1.11, which discourages the consideration of a defendant's military service, civic contributions, charitable activities, and "other similar prior good works," to *United States v. Big Crow*, 898 F.2d 1326 (8th Cir. 1990), and *United States v. Pipich*, 688 F. Supp. 991 (D. Md. 1988)).

The Commission has also tried to impose uniformity in situations where the rate of downward departures reflects the view that a particular Guidelines range often calls for a sentence greater than necessary to serve the purposes of sentencing. Instead of giving judges greater flexibility to take into account the factors motivating downward departures, the Commission has reacted by severely curtailing—or eliminating altogether—sentence reductions based on the cited factor. For instance, the high rate of downward departures in career offender cases has long been a symptom of the shortcomings in that Guideline. U.S. Sentencing Commission, *Final Report on the Impact of* United States v. Booker *on Federal Sentencing* (Mar. 2006) ("*March 2006 Booker Report*") at 137 (showing non-government-sponsored downward departures in 10% of cases between October 2002 and April 2003). Part of the explanation is that the Commission's expansive definition of predicate "crimes of violence" equates defendants with truly violent histories and those who have com-

mitted much less serious offenses.[13] The Commission responded to these frequent downward departures from the career offender guideline by severely and categorically limiting their magnitude. USSG App. C, amend 651 (2003) (adding USSG § 4A1.3(b)(3)(A), which limits downward departures based on overstatement of the criminal history of career offenders to a single criminal history category). As a result, district judges continue to find it necessary to sentence below the Guidelines range in a significant number of career offender cases. *See March 2006 Booker Report* at 137 (showing sentences imposed below the career offender Guidelines range, without government sponsorship for such a variance, in 21.5 percent of cases).

The problem lies not in the Commission's failure to produce Guidelines ranges that presumably account for all of Section 3553(a)'s factors and purposes in any given case; the problem lies in the unrealistic expectation that a system of detailed guidelines such as those the Commission promulgated is *capable* of doing so. In any given sentencing proceeding, the factors a judge must consider are numerous, and the interplay of those factors with each other and with the purposes of sentencing is complex. Further complicating matters, many of those factors and purposes cannot be quantified or otherwise converted to a form in which they possess

---

[13] The list of "crimes of violence" treated on the same level as murder, rape and armed robbery includes tampering with a motor vehicle, *United States v. Bockes*, 447 F.3d 1090 (8th Cir. 2006); driving while intoxicated, *United States v. McCall*, 439 F.3d 967 (8th Cir. 2006) (en banc); fleeing and eluding, *United States v. Richardson*, 437 F.3d 550 (6th Cir. 2006); mere possession of a short-barreled shotgun, *United States v. Delaney*, 427 F.3d 1224 (9th Cir. 2005); operating a motor vehicle without the owner's consent, *United States v. Lindquist*, 421 F.3d 751 (8th Cir. 2005); failing to return to a halfway house, *United States v. Bryant*, 310 F.3d 550, 553 (7th Cir. 2002); car theft, *United States v. Sun Bear*, 307 F.3d 747, 752-53 (8th Cir. 2002); burglary of a non-dwelling, *United States v. Hascall*, 76 F.3d 902, 904-06 (8th Cir. 1996); and oral threatening, *United States v. Leavitt*, 925 F.2d 516 (1st Cir. 1991).

a common denominator. Thus, even if the factual input is accurate, a Guideline computation gives a judge nothing more than the ability to compare a limited number of factors in one case to the same categories of factors in other cases. That computation is inherently incapable of producing a presumptively accurate "answer," however, because such a computation cannot take into account much of the input necessary to the process.

As a result of the inherent limitations of any guidelines system, and the demonstrated limitations of the one in place, a reviewing court should not presume that a Guidelines sentence is reasonable, much less should it require extraordinary circumstances to impose a sentence that varies substantially from the Guidelines.

III. Reasonableness Review Must Operate Without Giving The Guidelines Range Special Weight.

In clarifying "review for reasonableness," this Court and the courts of appeals must avoid characterizations that give the Guidelines any greater weight or prominence than other sentencing factors. In light of the *Booker* remedy for the Sixth Amendment defect in the Guidelines, the sentence that a judge is permitted to impose must not be dependent upon whether it is in close proximity to the Guidelines range. With Section 3553(b)(1) excised, the statute places no special weight on the Guidelines, a result also consistent with the fact that the Guidelines do not—and cannot—produce sentence ranges that take account of each factor and purpose a judge is required by law to consider.

District judges, free of the duty to give the Guidelines special prominence, will regain the ability to follow Section 3553(a)'s directive to take into account *all* of the statutory factors on a case-by-case basis, in order to arrive at a sentence "sufficient," yet "not greater than necessary," to achieve each statutory purpose of sentencing. In circuits that continue to give the Guidelines special status, district judges are unable to carry out this duty. Instead, as was the case

when Section 3553(b)(1) remained in effect, the courts of appeals frequently reverse below-Guidelines sentences because the district judge relied on a factor that failed to meet the test for downward departures. *See United States v. Dalton*, 404 F.3d 1029, 1033 (8th Cir. 2005) (below-Guidelines sentence based on the defendant's cooperation was unreasonable, because that "departure" exceeded the Guidelines' limits on "substantial assistance" downward departures); *United States v. Green*, 436 F.3d 449, 459 (4th Cir. 2006) (reversing below-Guideline sentence based on the defendant's efforts to obtain employment, his level of education, the non-use of a firearm, and his likelihood of contributing to society, because those factors are excluded from the Guidelines).

Ironically, if the government's version of reasonableness review prevails, judges will have less flexibility than when the guidelines were first promulgated as binding directives. This Court then recognized the district courts' "institutional advantage over appellate courts" in determining how cases compare to one another. *Koon*, 518 U.S. at 98 (1996) (explaining that district courts "see so many more Guidelines cases than appellate courts do"). "[T]he district court must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing." *Id.*; *see also United States v. Diaz-Villafane*, 874 F.2d 43, 49-50 (1st Cir. 1989) ("District courts are in the front lines, sentencing flesh-and-blood defendants. The dynamics of the situation may be difficult to gauge from the antiseptic nature of a sterile paper record. Therefore, appellate review must occur with full awareness of, and respect for, the trier's superior 'feel' for the case.")

By giving the Guidelines special, nearly conclusive, weight, the courts of appeals have deprived district judges of the opportunity to decide the appropriate weight of that factor on a case-by-case basis, informed by their institutional advantage in evaluating the full mix of sentencing factors presented in each particular case. In some instances, the judge will find it appropriate to give the Guidelines significant weight be-

cause the other factors point to the same result. In other cases, the judge will determine that the Guidelines should be given little weight because other important factors point to a different result, a sentence that may be either higher or lower than the Guidelines range. To say that courts should "presume" the other factors will align with the Guidelines is—to put a twist on Justice Scalia's analogy—as useful as presuming that the use of a large amount of one ingredient in every recipe will result in an appetizing dish.[14] The mix of other factors present in each case will dictate the degree to which the court should rely on the Guidelines; a presumption is not useful when the mix of those factors can and will vary from one case to the next. "Importantly, there is no assumption here that a guidelines sentence complies with the purposes of the sentencing statute. Instead, that compliance must be tested by consideration of the multiple factors set forth in the sentencing statute, with particular attention to the factors identified by the parties in their arguments." *Jiménez-Beltre*, 440 F.3d at 526 (Lipez, J. dissenting).

For district judges to exercise their traditional sentencing discretion, consistent with both the Sentencing Reform Act and the Sixth Amendment, they must be able to consider each sentencing factor, along with the various purposes of sentencing, unhampered by artificial presumptions about the reasonableness of a within-Guidelines sentence.

CONCLUSION

The judgments of the courts of appeals should be reversed and the cases remanded for proceedings consistent with the limited role the Sentencing Guidelines may play after *United States v. Booker*.

---

[14] Justice Scalia criticized the majority's selective excision of provisions from the Act, concluding it "is rather like deleting the ingredients portion of a recipe and telling the cook to proceed with the preparation portion." *Booker*, 543 U.S. at 307 (Scalia, J., dissenting).

Respectfully submitted.

JEFFREY L. FISHER
CO-CHAIR, NACDL
AMICUS COMMITTEE
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081

MIGUEL A. ESTRADA
Counsel of Record
DAVID DEBOLD
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Amicus Curiae

December 18, 2006